

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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| In the Matter of the Petition | : | |
| of | : | |
| BRYAN W. ZOELCH | : | |
| for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Years 2000 and 2001. | : | DETERMINATION DTA NO. 819452 |

Petitioner, Bryan W. Zoelch, 30 Seaman Avenue, #1E, New York, New York 10034, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law for the years 2000 and 2001.

On August 7, 2003, the Division of Taxation filed a motion for an order dismissing the petition and granting summary determination to the Division of Taxation on the ground that there are no material issues of fact and that the facts mandate a determination in favor of the Division of Taxation. Petitioner's response was due by September 8, 2003, which commenced the 90-day period for issuing this determination. The Division of Taxation appeared by Mark F. Volk, Esq. (John E. Matthews, Esq., of counsel). Petitioner appeared *pro se*. Based upon the pleadings and motion documents submitted, Catherine M. Bennett, Administrative Law Judge, renders the following determination.

ISSUE

Whether summary determination should be granted in favor of the Division of Taxation because petitioner failed to file a petition or request for conciliation conference within 90 days of the issuance of the notices of deficiency.

FINDINGS OF FACT

1. On March 28, 2003, the Division of Tax Appeals received a petition challenging assessments of personal income tax for tax years 2000 and 2001.

2. In response to the petition, the Division of Taxation (“Division”) filed a Motion to Dismiss the petition or for Summary Determination on the grounds that petitioner failed to file a request for a conciliation conference or file a petition for a hearing within 90 days of the issuance of the notices of deficiency. In support of the motion, the Division submitted, among other things, an affidavit from Geraldine Mahon which attests to the regular procedures followed by the Case and Resource Tracking System (“CARTS”) with respect to the processing of statutory notices prior to their shipment to the Division’s Mail Processing Center for mailing.

3. As part of Ms. Mahon’s regular duties, she supervises the processing of notices of deficiency and determination prior to their mailing. She receives a computer printout referred to as the “certified mail record.” Each of the notices is predated with the anticipated date of mailing and is assigned a certified control number which is recorded on the certified mail record.

4. The certified mail record pertaining to the mailing at issue consisted of 11 fan-folded (connected) pages and included a notice issued to Bryan W. Zoelch on August 1, 2002. The certified mail record has all pages connected when the document is delivered into the possession of the U.S. Postal Service (“USPS”). The pages remain connected until otherwise requested by Ms. Mahon. There are 11 entries on each of the first 10 pages, and 5 entries on page 11. Portions of the certified mail record have been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding.

5. In the upper left hand corner of the first page of the certified mail record the date July 22, 2002 was manually changed to August 1, 2002. The original date of July 22, 2002 was the date that the certified mail record was printed. The certified mail record is printed approximately 10 days in advance of the anticipated date of mailing of the particular statutory notices in order to ensure that there is sufficient lead time for the statutory notices to be manually reviewed and processed for postage by the Division's Mail Processing Center. The handwritten change of the date from July 22, 2002 to August 1, 2002 was made by personnel in the Division's Mail Processing Center. This change was made in order to ensure that the date on the certified mail record conformed with the actual date that the statutory notices and the certified mail record were delivered to the USPS.

6. Each statutory notice is placed in an envelope by Division personnel and delivered into the possession of a Postal Service representative who affixes his or her initials or signature or a U.S. postmark to a page or pages of the certified mail record. In this instance, a Postal Service representative initialed page 11 of the certified mail record, circled the total number of pieces received at the post office on the same page and affixed a postmark to each page of the certified mail record. In the regular course of business and as a common practice, the Division does not request, demand or retain return receipts from certified or registered mail. The procedures followed and described are the normal and regular procedures of the CARTS control unit.

7. As noted, in conjunction with the affidavit of Ms. Mahon, the Division offered the certified mail record and a copy of the notice concerning Assessment No. L021071057-3. On its face, the information on the certified mail record corresponds with the description set forth in the affidavit. Among other things, the certified mail record shows that the first sheet is labeled "NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE - ASSESSMENTS

RECEIVABLE - CERTIFIED RECORD FOR NON-PRESORT MAIL.” The upper right-hand corners of the pages are consecutively numbered from page 1 to page 11. The upper left-hand corner of each page contains the printed date of “07/22/02.” On the first page, this date was crossed out and a new date of “8-1” was written above the original printed date. Each of the pages contains columns labeled “Certified No.,” “Reference number,” “Name of Addressee, Street and P.O. Address,” “Postage,” “Fee” and “RR Fee.” Certified numbers are listed in a vertical column on the left side of each page. Page one contains the entry which sets forth petitioner's name and address, reference number L 021071057 using control number 7104 1002 9739 0109 2018. The reference number corresponds with the one found on the notice which is attached to the affidavit of Ms. Mahon. On page 11, the “total pieces and amounts listed” is stated to be 115 and is circled. In addition, the total fee of \$264.50 is consistent with the mailing of 115 pieces of mail at a fee of \$2.30 per item. An August 1, 2002 date stamp from the Colonie Center Branch of the United States Postal Service appears on each page of the certified mail record which accompanied the affidavit of Geraldine Mahon.

8. As an exhibit, the Division offered a copy of the notice dated August 1, 2002, assessing personal income tax due for the tax period ended December 31, 2000. The tax was assessed in separate amounts of \$1,412.95 and \$195.04, plus penalty and interest, by Assessment ID No. L-021071057-3. In addition, attached to the petition was an ATC Collection Notice dated March 3, 2003, with a Consolidated Statement of Tax Liabilities indicating that Assessment No. L-021071057-3 was then subject to collection action and Assessment ID No. L-021419324-5 was currently under review.

9. The affidavit of Daniel Lafar, the Principal Mail and Supply Clerk in the Division's Mail Processing Center, attests to the regular procedures followed by the Mail Processing Center

in the ordinary course of its business of delivering outgoing certified mail to branches of the USPS. Statutory notices which are ready for mailing to taxpayers are received by the Mail Processing Center in an area designated for outgoing certified mail. A certified mail record is also received by the Mail Processing Center for each batch of statutory notices. A member of the staff operates a machine, which places each statutory notice into an envelope, weighs and seals the envelopes and places postage and fee amounts on the envelopes. A mail processing clerk checks the first and last pieces of certified mail listed on the certified mail record against the information contained on the certified mail record. The clerk then performs a random review of 30 or fewer pieces of certified mail listed on the certified mail record by checking those envelopes against the information contained on the certified mail record.

10. A member of the Mail Processing Center staff delivers the sealed, stamped envelopes to one of the various branch offices of the USPS located in the Albany, New York area. A USPS employee will then affix a postmark and his or her initials or signature to the certified mail record indicating receipt of the mail listed on the certified mail record and of the certified mail record itself. The USPS has been requested by the Mail Processing Center to either circle the number of pieces received or indicate the total number of pieces received by writing the number of pieces on the mail record. As a matter of standard procedure, the certified mail record is left overnight at the USPS to enable the postal employees to process the certified mail and make the appropriate notations on the certified mail record. On the following day, the certified mail record is picked up at the USPS by a member of the Mail Processing Center staff, whereupon it is delivered to the Carts Control Unit. The certified mail record retrieved from the USPS is the Division's record of receipt by the USPS for the pieces of certified mail listed thereon. The foregoing procedures were the regular procedures followed by the Mail Processing Center in the

ordinary course of business when handling items to be sent by certified mail, and these procedures were followed on August 1, 2002.

11. Petitioner filed a New York State personal income tax return for the years 2000 and 2001 in April of 2001 and 2002, respectively, which stated that petitioner's address was 30 Seaman Avenue, New York, New York 10034. This is the same address which appears on the notices and certified mail record of August 1, 2002.

12. Petitioner requested a conference before the Bureau of Conciliation and Mediation Services ("BCMS") dated January 15, 2003 concerning Assessment ID No. L-021419324-5, which was held on June 17, 2003. Information regarding the issuance of a Conciliation Order as to that notice has not been provided.

13. The petition of Mr. Zoelch was received by the Division of Tax Appeals on March 28, 2003. The postmark on the envelope in which the petition was received was dated March 26, 2003.

SUMMARY OF THE PARTIES' POSITIONS

14. Petitioner did not respond to the Division's motion for summary determination.

15. The Division moves to dismiss the petition as to Assessment L021419324 inasmuch as the assessment was under review by BCMS at the time petitioner filed his petition in this matter on March 26, 2003, and was thus premature, since petitioner had not withdrawn his protest at BCMS or received a conciliation order.

The Division moves for summary determination as to the Assessment No. L021071057 since petitioner made an untimely request to protest the notice before BCMS or the Division of Tax Appeals, as petitioner's request for a BCMS conference was filed more than 90 days from the date the notice was issued.

CONCLUSIONS OF LAW

A. Any taxpayer who has received a statutory notice may request a conciliation conference before BCMS by filing a written request in compliance with 20 NYCRR 4000.3(a), within the time limitations for filing a petition for hearing in the Division of Tax Appeals, which in this case is 90 days from the date of the mailing of the statutory notice (20 NYCRR 4000.3[c]). A timely request for a conciliation conference suspends the running of the period of limitations for the filing of a petition for hearing (*id.*) At any time before the conciliation order is issued, petitioner may discontinue the conciliation conference by filing a request for discontinuance pursuant to 20 NYCRR 4000.6. Petitioner then has 90 days from the time the request for discontinuance is filed to petition for a hearing in the Division of Tax Appeals (20 NYCRR 4000.6[b]). If a conciliation conference has been completed and a conciliation order issued, petitioner has 90 days from the issuance date of the conciliation order to file a petition for hearing with the Division of Tax Appeals, since the request for a conciliation conference suspended the original 90-day period in which to file a petition.

Petitioner's action to have Assessment L021419324 reviewed by the Division of Tax Appeals in a hearing is premature based upon the regulations noted above. The procedures are structured such that if a review is requested by BCMS, then the period of limitations for filing a petition for review by the Division of Tax Appeals is suspended. Further, once the matter before BCMS is discontinued or concluded by the issuance of the order, the 90-day period for the filing of a petition recommences. The proceedings before BCMS and the Division of Tax Appeals on

the same matter are not intended to run concurrently, but rather sequentially. Accordingly, petitioner's petition concerning Assessment L021419324 is dismissed.¹

B. A party may move for summary determination pursuant to 20 NYCRR 3000.9(b)(1) after issue has been joined. The regulation provides, in pertinent part, that:

Such motion shall be supported by an affidavit, by a copy of the pleadings and by other available proof. The affidavit, made by a person having knowledge of the facts, *shall recite all the material facts and show that there is no material issue of fact*, and that the facts mandate a determination in the moving party's favor. The *motion shall be granted if*, upon all the papers and proof submitted, *the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented* and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party. The motion shall be denied if any party shows facts sufficient to require a hearing of any material and triable issue of fact (emphasis added).

C. Section 3000.9(c) provides that a motion for summary determination is subject to the same provisions as a motion for summary judgment pursuant to CPLR 3212. "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316, 317, *citing Zuckerman v. City of New York*, 49 NY2d 557, 427 NYS2d 595).

Inasmuch as summary judgment is the procedural equivalent of a trial, it should be denied if there is any doubt as to the existence of a triable issue or where the material issue of fact is "arguable" (*Glick & Dolleck v. Tri-Pac Export Corp.*, 22 NY2d 439, 293 NYS2d 93; *Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 AD2d 572, 536 NYS2d 177). If material facts are in dispute, or if contrary inferences may be drawn reasonably from

¹ Petitioner will have 90 days from the issuance of the conciliation order to file a petition for hearing on Assessment L021419324.

undisputed facts, then a full trial is warranted and the case should not be decided on a motion (*Gerard v. Inglese*, 11 AD2d 381, 206 NYS2d 879).

D. It is the contention of the Division that it is entitled to summary determination in its favor because petitioner failed to file a timely request for a conciliation conference in protest of the notice of deficiency concerning Assessment No. L021071057.

Tax Law § 681(a) authorizes the Division of Taxation to issue a Notice of Deficiency to a taxpayer where the Division determines that there is a deficiency of income tax. This section further provides that such a notice “shall be mailed by certified or registered mail to the taxpayer at his last known address.” The statute does not require actual receipt by the taxpayer. The Division is entitled to rely upon the address on the last return filed by the taxpayer unless the taxpayer clearly informs the Division that it wishes the address of record to be changed (*Matter of Brager*, Tax Appeals Tribunal, May 23, 1996, citing *Powell v. Commissioner*, 958 F2d 53, 92-1 US Tax Cas ¶ 50,147, *cert denied* 506 US 965; *Abeles v. Commissioner*, 91 TC 1019). Where the Division establishes that its statutory notice of deficiency has been properly issued, that is, sent by certified or registered mail to the taxpayer’s last known address, the notice is valid and sufficient whether or not actually received (*see, Matter of Malpica*, Tax Appeals Tribunal, July 19, 1990; *Matter of Kenning v. State Tax Commn.*, 72 Misc 2d 929, 339 NYS2d 793, *affd* 43 AD2d 815, 350 NYS2d 1017, *appeal dismissed* 34 NY2d 667, 355 NYS2d 1028; *compare, Matter of Ruggerite, Inc. v. State Tax Commn.*, 97 AD2d 634, 468 NYS2d 945, *affd* 64 NY2d 688, 485 NYS2d 517). If the notice is properly mailed, the statute places risk of nondelivery on the taxpayer (*see, Matter of Malpica, supra*).

Where the timeliness of either a petition filed with the Division of Tax Appeals or a request for conciliation conference filed with BCMS is at issue, it is incumbent upon the

Division to show that its original notice was properly mailed and when it was mailed. In *Matter of Brager* (*supra* [a case dealing with the timeliness of a petition measured from the issuance of a notice of deficiency]) the Tax Appeals Tribunal summarized such requirements as follows:

When the timeliness of a filed petition is at issue, the Division must demonstrate proper mailing (*Matter of Katz*, Tax Appeals Tribunal, November 14, 1991; *Matter of Novar TV & Air Conditioner Sales & Serv.*, Tax Appeals Tribunal, May 23, 1991) To show that the notices were properly mailed to the taxpayer's last known address by certified or registered mail, the Division must provide evidence as to the general mailing procedure and evidence that this procedure was adhered to with respect to the notice in question (*Matter of Katz, supra*; *Matter of Novar TV & Air Conditioner Sales & Serv., supra*). Once this burden is met, a presumption of proper mailing arises (*Matter of MacLean v. Procaccino*, 53 AD2d 965, 386 NYS2d 111, 112). If, on the other hand, the Division fails to affirmatively carry its burden and the date of mailing is not established, the statutory time period is not triggered and the petition will be deemed timely filed (*Matter of Katz, supra*; *Matter of Huang*, Tax Appeals Tribunal, April 27, 1995; *Matter of Fuchs*, Tax Appeals Tribunal, April 20, 1995).

E. The Mahon and Lafar affidavits establish the general mailing procedures for mailing of notices of deficiency. The process begins in the CARTS Control Unit. Notices are printed with a future anticipated date of mailing to allow time for the processing of the notices. A certified control number is placed on each notice. The CMR lists each notice number, the name and address of the taxpayer and a corresponding certified mail number. The notices are placed in envelopes. In the Mail Processing Center, employees weigh and seal the envelopes containing the notices, ensure the proper postage and fees are affixed to the envelopes, compare the information on the envelopes with that on the CMR, count the envelopes, and change the date on page one of the CMR from the date it was printed to the date the CMR and notices are to be delivered to the post office. The CMR and the notices are then delivered to the post office. A postal employee signs or affixes a postmark to the CMR or both. With regard to the CMR for

August 1, 2002, the Lafar affidavit states that the postal employee is requested to either write in the number of pieces received at the post office in the space provided or circle the number for the pieces listed to indicate that was the number received. Usually the following day an employee of the Mail Processing Center returns to the post office to pick up the completed CMR. Completed CMRs are then returned to the CARTS Control Unit. In cases of multi-page CMRs, the pages are connected when delivered to the United States Postal Service and remain connected even after being delivered back to the CARTS Control Unit, unless the Principal Clerk of the unit requests that the pages be disconnected.

F. The August 1, 2002 CMR, submitted into evidence, illustrates that the Division's mailing procedures were followed in this case. The name, address, notice number and certified control number on Assessment No. L021071057 issued to petitioner correspond with the one listed on the CMR submitted in this matter. The date of the Postal Service postmark on the page of the CMR listing the notice at issue, and the last page where the Postal Service employee's initials are found, indicates the notice was mailed on August 1, 2002. On page 11 of the CMR, the number "115" has been written next to "TOTAL PIECES AND AMOUNTS LISTED" and beside initials of a Postal Service employee. The postal employee circled the number "115" to indicate the number of pieces of mail received by the USPS. Accordingly, the Division has established that the notices of deficiency were mailed on August 1, 2002.

The Tax Appeals Tribunal has held that evidence of general mailing procedures together with a properly completed CMR is sufficient to prove mailing (*see, Matter of Katz, supra*). Since there is both with regard to Assessment No. L021071057, the Division is entitled to the presumption of proper mailing as to that notice on August 1, 2002.

G. As previously stated, the Division is entitled to rely upon the address on the last return filed by the taxpayer unless the taxpayer clearly informs the Division that it wishes the address of record to be changed (*see, Powell v. Commissioner, supra; Abeles v. Commissioner, supra*). In this case, the Division mailed the notice to petitioner at “30 Seaman Ave. 1E, New York, New York 10034,” on August 1, 2002. This address was the address petitioner provided to the Division based upon the last return filed by petitioner, Form IT-200, dated April 11, 2002. Petitioner did not provide any notification between April 11 and August 1, 2002 of an address change. Thus, it is concluded that petitioner’s last known address was used for the mailing of the notices in issue.

H. Pursuant to Tax Law § 681(b), petitioner had 90 days from the mailing of the Notice of Deficiency to file a petition with the Division of Tax Appeals or, in the alternative, to file a request for a conciliation conference with BCMS pursuant to Tax Law § 170(3-a), after which time a notice of deficiency becomes an assessment (Tax Law § 170[3-a]; § 689[b]; 20 NYCRR 4000.3[c]). The last day on which petitioner could have made a timely request for a conciliation conference with BCMS or filed a timely petition with the Division of Tax Appeals was October 30, 2002. Petitioner in this case chose to file a request for conciliation conference, which was not mailed until January 15, 2003. Since the request was not timely filed, the petition must be dismissed.

I. It is noted that petitioner is not without recourse here, for he may pay the disputed tax and, within two years from the date of payment, apply for a refund (Tax Law § 687[a]). If his request for a refund is denied, petitioner may then proceed with another petition requesting a hearing or a conciliation conference (Tax Law § 689[c]; § 170[3-a][a]; *Matter of Rosen*, Tax Appeals Tribunal, July 19, 1990).

J. Inasmuch as there are no triable issues of fact in this case which prevent a determination based on a motion for summary determination, the Division's motion for summary determination is granted as to Notice of Deficiency Assessment No. L021071057, dated August 1, 2002.

Accordingly, as to both notices, Assessment No. L021071057 and Assessment No. L021419324 (*see*, Conclusion of Law "A"), the petition of Bryan W. Zoelch is hereby dismissed.

DATED: Troy, New York
December 4, 2003

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE